Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Federal-State Joint Board on Universal Service	CC Docket No. 96-45
1998 Biennial Regulatory Review – Streamlined Contributor Reporting Requirements Associated with Administration of Telecommunications Relay Service, North American Numbering Plan, Local Number Portability, and Universal Service Support Mechanisms	CC Docket NO. 98-171
Changes to the Board of Directors of the National Exchange Carrier Associations, Inc.	CC Docket No. 97-21

APPLICATION FOR REVIEW

Dated: January 10, 2005

Respectfully submitted,

BUSINESS DISCOUNT PLAN, INC.

INDEX TO APPLICATION FOR REVIEW

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APPLICATION FOR REVIEW

Business Discount Plan, Inc. ("BDP"), through its attorneys, Shughart Thomson & Kilroy, P.C., and pursuant to Section 1.115(a) of the Rules and Regulations of the Federal Communications Commission ("FCC"), 47 C.F.R. § 1.115, files its Application for Review ("Application") of the Order of the Chief, Wireline Competition Bureau, released December 9, 2004 (the "December 9 Order"). In support of this Application, BDP respectfully states as follows:

II. INTRODUCTION.

BDP seeks review of the December 9 Order which fixes a firm 12-month deadline for filing revisions to FCC Form 499-A, and updates the Instructions to Form 499-A to state the FCC's intention to reject as untimely any Form 499-A revised filing not submitted within 12 months of the due date of the original filing in question, if the revision would decrease regulatory fees or contributions to support mechanisms for universal service, interstate Telecommunications Relay Service, number administration or local number portability (collectively the "Universal Service Fund" or "USF"). December 9 Order at ¶¶ 1, 10 – 14.

The December 9 Order notes that a number of parties filed requests for review of decisions by the Universal Service Administration Company ("USAC") rejecting their revised FCC Form 499-A as untimely under USAC's processing guidelines. The December 9 Order grants such requests for review and remands them to the USAC for consideration, except for those requests that encompass issues in addition to revised 499-A issues. As to such issues, the Bureau Chief, Wireline Competition ("WCB") retained them for its disposition or disposition by the FCC. BDP is one of the parties that filed a request for review.

In this Application, BDP seeks review of the December 9 Order only insofar as it establishes a 12-month deadline for filing revisions to the FCC Form 499-A, and states the FCC's intention to reject as untimely any Form 499-A revised filing not submitted within 12 months of the due date of the original filing in question, if the revision would decrease regulatory fees or contributions and support mechanisms for the USF.

III. **BDP STATEMENT OF INTEREST IN THIS PROCEEDING**.

BDP is an interexchange carrier providing both domestic and international long distance service to customers located throughout the United States, and is subject to regulation by the FCC. Pursuant to Section 254 of the Communications Act of 1934, as amended, 47 U.S.C. § 254, and the FCC's rules and regulations promulgated thereunder, BDP, as a telecommunications carrier offering interstate telecommunications service has made, and will continue to make, contributions to USAC for the USF. Moreover, as stated above, BDP is one of the parties referred to in the December 9 Order which filed a request for review of decisions by USAC rejecting BDP's revised FCC Form 499-A filings.

Accordingly, BDP has a very substantial interest in the fixing of a deadline for filing FCC Form 499-A. BDP has not previously filed comments or otherwise participated in the above-captioned dockets, because none of these dockets raised the issue of establishing a firm deadline for

filing revisions to FCC Form 499-A or similar USF reports. Indeed, as the December 9 Order states, the WCB establishes for the first time a definite 12-month deadline for filing a revision to FCC Form 499-A. Thus, BDP had no prior opportunity to address this issue as the FCC has not previously given notice and requested comments of interested parties on this subject.

IV. QUESTION PRESENTED FOR REVIEW.

1. Did the WCB exceed its authority in establishing a 12-month deadline for filing revisions to annual Telecommunications Reporting Worksheet after the due date of the original filing of FCC Form 499-A, if the revision would decrease regulatory fees or contributions to support mechanisms in USF?

2. Did the WCB act arbitrarily and capriciously in establishing a 12-month deadline for filing revisions to the annual Telecommunications Reporting Worksheet for filing revisions to FCC Form 499-A after the original due date, if the revision would decrease regulatory fees or contributions to support mechanisms for the USF?

3. Did the WCB abuse its discretion in establishing a 12-month deadline for filing revisions to the annual Telecommunications Reporting Worksheet for filing revisions to FCC Form 499-A after the original due date, if the revision would decrease regulatory fees or contributions to support mechanisms for the USF?

V. THE DECEMBER 9 ORDER.

Relying on the authority delegated to it to waive, reduce or eliminate the contributory reporting requirements associated with universal service support mechanisms, the WCB, in its December 9 Order, changed the Form 499-A instructions by establishing a firm 12-month deadline for contributors to file revised Form 499-As after their original due date, if they would result in decreased contribution amounts to the USF. In doing so, the WCB asserts, albeit in a footnote in the December 9 Order, that this change is a "procedural, non-substantive" change to the administrative aspects of the reporting requirements, and that establishment of this deadline is a "rule of agency organization, procedure or practice." December 9 Order at n. 31. Therefore, the WCB asserts that it

was not required to follow the procedures for notice and comment set out in Section 553 of the Administrative Procedure Act, 5 U.S.C. § 553 before adopting this new deadline.[1]

In the December 9 Order, the WCB attempts to justify the 12-month deadline on several grounds. First, the 12-month deadline is a sufficient period of time for carrier contributors to file revised Form 499-As for the purpose of reducing their contribution obligations. Second, with regard to universal service contributions, the WCB contends that the quarterly filed 499-Qs contain information about both projected revenue for the upcoming quarter and actual revenue for the past quarter, and therefore, provide an opportunity for carriers to report actual revenue information from the prior quarter. Third, the WCB concludes that since telecommunications carriers file revenue information for the prior year on April 1 of each year, such a filing represents an opportunity to correct previously filed revenue information. The WCB adds that the 12-month period provides an incentive to submit accurate revenue information in a timely manner. The WCB's new FCC Form 499-A revision filing deadline establishes a strict window of 12 months for carriers to determine whether the revenue they reported and the contribution amounts they paid to the USAC the prior year were too high, and whether to file for a refund.

VI. **THE BASIS FOR BDP'S APPLICATION FOR REVIEW**.

BDP challenges the WCB's establishment of the 12-month deadline for filing revisions to the FCC Forms 499-A as contrary to the statutory notice and comment requirements of the Administrative Procedure Act, 5 U.S.C. § 553 (the "APA" or the"Act") and case precedent. BDP contends that the WCB's imposition of the strict 12-month deadline for filing revised FCC Form 499-A exceeds the WCB's delegated authority, that the 12-month deadline is a substantive rule adopted without observing the notice and comment procedure required under the APA, and that the

[1] Changes to Board of Directors of the National Exchange Carrier Association, Inc., Federal-State Joint Board on Universal Service, Report and Order on Recommendation, 12 FCC Rcd. 18400 (1997) (the "Second Order on Reconsideration").

WCB's action constitutes agency action which is arbitrary and capricious, and an abuse of discretion.

For these reasons discussed in more detail below, BDP requests that the FCC review the December 9 Order and declare it invalid as unlawful because it was imposed without adhering to the required notice and comment rulemaking delegated authority and is arbitrary and capricious and an abuse of the WCB's discretion.

VII. ARGUMENT.

A. The WCB's 12-month Statute of Limitations for Filing Revised FCC Worksheets is Invalid because it is a Substantive Rule Adopted without Following the APA's Notice and Comment Procedures.

1. The Assessment and Recovery of Universal Service Contributions.

a. The Assessment and Recovery of Universal Service Contributions are Governed by § 254 of the Communications Act.

The federal Universal Service Fund is a funding mechanism mandated and expanded under the Communications Act, 47 U.S.C. § 151 et. seq. (the "Act" or "Communications Act"). The assessment and recovery of contributions to support USF are governed by the statutory framework established by Congress in Sections 201, 202 and 254 of the Act, 47 U.S.C. §201, 202 and 254.[2]

Specifically, Section 254(d) of the Act states that "[e]very telecommunications carrier that provides interstate telecommunications service shall contribute, on an equitable and nondiscriminatory basis, to the specific, predictable, and sufficient mechanisms established by the Commission to preserve and enhance universal service." *Id.* citing, *inter alia*, 47 U.S.C. § 254(d) (emphasis added); 47 U.S.C. § 254 (b) (4) and (5) (providing that Commission policy on universal service shall be based, in part, on the principles that "contributions should be equitable and

[2] December 9 Order at ¶ 4; In the Matter of Federal-State Joint Board on Universal Service, Report and Order and Second Further Notice of Proposed Rulemaking, CC Docket No. 96-45, ("Contribution Methodology Order and Further Notice") 17 FCC Rcd 249 52 (2002); *see also* 47 C.F.R. § 54.706.

nondiscriminatory, and support mechanisms should be specific, predictable, and sufficient." (Emphasis added).

b. **The FCC's Methodology for Assessing Universal Service Contributions**.

In its 1997 Universal Service Order,[3] the FCC decided to assess contributions on contributors' gross-billed end-user telecommunications revenues. The FCC concluded that assessments based on end-user telecommunications revenues would be competitively neutral, would be easy to administer, and would eliminate certain economic distortions if associated with an assessment based on gross telecommunications carriers' revenues. Universal Service Order, 12 FCC Rcd at 9206-09, ¶¶ 844-50.

In its Second Order on Reconsideration[4], the FCC set forth the specific method of computing universal service contributions. The FCC also designated the USAC as the neutral entity responsible for administering the universal service support mechanisms, including billing contributors, collecting contributions to the universal service support mechanisms, and disbursing universal service support funds. *Id.* at 18423-24, ¶ 41; *see also* 47 C.F.R. § 54.701.

The FCC required contributors to report their end-user telecommunications revenues to the USAC on a semi-annual Telecommunications Reporting Worksheet, and base contributions on the reporting of billed end-user telecommunications revenues from the prior year. Second Order on Reconsideration, 12 FCC Rcd 18400, Appendix B; *see also* 47 C.F.R. § 54.711(a) (providing that "[c]ontributions shall be calculated and filed in accordance with the Telecommunications Reporting Worksheet..."); Second Order on Reconsideration, 12 FCC Rcd at 18424, ¶ 43, 18442, ¶ 80, 18501-02, Appendix C.

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[3] Federal-State Joint Board on Universal Service, CC Docket No. 96-45, Report and Order, 12 FCC Rcd 8776, 9205-07, ¶ ¶ 843-44 (1997), as corrected by Federal-State Joint Board on Universal Service, Erratum, CC Docket No. 96-45, FCC 97-157 (rel. June 4, 1997) and Erratum, 13 FCC Rcd 24493 (1997), aff'd in part, rev'd in part, remanded in part *sub nom*, Texas Office of Public Utility Counsel v. FCC, 183 F. 3d 393 (5th Cir. 1999), cert. denied, 530 U.S. 1210 (2000), cert. dismissed, 531 U.S. 975 (2000) (Universal Service Order).

[4] See n. 1, *supra*.

c. **The FCC's Consolidated Reporting Order and FCC Form 499-A**.

Subsequent to its Second Order on Reconsideration, in an effort to reduce the administrative burdens on contributors, the FCC decided to consolidate carrier reporting requirements for the USF.[5] Thus, in lieu of making four separate filings to USAC, reporting carriers would simply file one copy of the new FCC Form 499-A on April 1 of 2000 and each following year. *Id.* at ¶ 1.[6] The FCC emphasized that it was not imposing new reporting requirements on carriers, but instead was "simplifying the requirements to the greatest extent possible while continuing to ensure the efficient administration of the support and cost recovery mechanisms." *Id.* at ¶ 1. Indeed, the FCC noted that, with certain limited exceptions, it was not revisiting, among other things, the substantive requirements of the support and cost recovery mechanisms under the USF. Rather, the Consolidated Reporting Order focused on steps to reduce burdens on contributors, and burdens on the administrators to handle the contributions, by improving the data collection process. *Id.* at ¶ 5.[7] Significantly, FCC Form 457, the prior Worksheet pertaining to universal service contributions (see note 5, *supra*), specifically required telecommunications carriers to "file a revised Worksheet if it

[5] *See* 1998 Biennial Regulatory Review-Streamlined Contributory Reporting Requirements Associated with Administration of Telecommunications Relay Service, North American Numbering Plan, Local Number of the Portability, and Universal Service Support Mechanisms. CC Docket 98-171, Report and Order, 14 FCC Rcd 16602 (1999) (Consolidated Reporting Order); *see also* Common Carrier Bureau Announces Release of September Version of Telecommunications Reporting Worksheet (FCC Form 499-S) for Contributions to the Universal Service Support Mechanisms, CC Docket No. 98-171, Public Notice, DA 99-1520 (rel. July 30, 1999); Common Carrier Bureau Announces Release of Telecommunications Reporting Worksheet (FCC Form 499-A) for April 1, 2000 Filing by All Telecommunications and Carriers, CC Docket No. 98-1 71, Public Notice, 15 FCC Rcd 16434 (Com. Car. Bur. 2000).

[6] Prior to the FCC's Consolidated Reporting Order, FCC rules required telecommunications carriers having interstate revenues to file, at different times throughout the year, a number of contributor reporting worksheets reflecting duplicative reporting requirements. Specifically, such carriers had to file four forms (*viz.*, Form 431, TRS Fund Worksheet; Form 457, Universal Service Worksheet; Form 496, NANPA Funding Worksheet; and Form 487, LNP Worksheet) containing revenue and other data on which contributions to support or cost recovery mechanisms were based. Consolidated Reporting Order, at ¶ 6.

[7] The FCC noted that, in its September 25, 1998 Notice of Proposed Rulemaking and Notice of Inquiry to Initiate the Consolidated Reporting Order Proceeding, it sought comments on ways to streamline the filing requirements associated with the support and cost recovery mechanisms required under the Communications Act. *Id.* at ¶ 7. The FCC, however, never sought comment in this notice (or indeed, in any other rulemaking proceeding of which BDP is aware) on whether to impose a time period within which to file revisions to FCC Form 499-A.

discover[ed] an error in the data that it reports."[8] Form 457, however, contained no deadline for filing such revisions.

In its Consolidated Reporting Order, the FCC clarified that the new Telecommunications Reporting Worksheet would become effective upon approval by the Office of Management and Budget ("OMB"), but not less than 30 days from publication in the Federal Register. *Id.* at ¶ 32. The FCC delegated authority to make future changes to the Telecommunications Reporting Worksheet to the Chief of the Common Carrier Bureau (now Chief, Wireless Competition Bureau). Consolidated Reporting Order, at ¶ 39. The FCC cautioned, however, that "[t]hese delegations extended to administrative aspects of the requirements, *e.g.*, where and when worksheets are filed, incorporating edits to reflect Commission changes to the substance of the mechanisms, and other similar details." *Id.* at ¶ 39. To ensure that its delegations to the then Common Carrier Bureau were consistent, the FCC stated that it was amending its rules "to grant the Common Carrier Bureau delegated authority, in keeping with the current delegation for universal service purposes, to waive, reduce, modify, or eliminate the contributor reporting requirements for the TRS, LNP, and NANP mechanisms, as necessary to preserve the sound and efficient administration of the support and cost recovery mechanisms." *Id.* at ¶ 40. The FCC "reaffirm[ed] that this delegation extends only to making changes to the administrative aspects of the reporting requirements, not to the substance of the underlying programs." *Id.* at ¶ 40 (emphasis added); 47 C.F.R. § 54.711(c.).

The current instructions to FCC Form 499-A (shown in draft released February 26, 2004) require telecommunications carriers to file a revised worksheet if they discover an error in the revenue data that they report. Specifically, the Instructions provide that "[t]elecommunications providers should file revised Form 499-A revenue data by December 1 of the same filing year. Revisions filed after that must be accompanied by an explanation of the cause for the change along

[8] Second Order on Reconsideration,, *supra* n. 1, III Appendix A, Universal Service Worksheet Form 457, Specific Instructions, C Block 3: Certification.

with complete documentation showing how the revised figures derived from corporate financial records." Telecommunications Reporting Worksheet, FCC Form 499-A, Instructions for Completing the Worksheet for Filing Contributions to Telecommunications Relay Service, Universal Service, Number Administration, and Local Number Portability Support Mechanisms (Draft) released February 26, 2004. [9]

As referenced above, on February 26, 2004, the WCB announced the release of a draft revised Telecommunications Reporting Worksheet, FCC Form 499-A and accompanying instructions for the reporting year ended 2003.[10]

d. **The FCC's Form 499-Q**.

In March, 2001, the FCC adopted a rule change providing that Universal Service contributions be based on quarterly Telecommunications Reporting Worksheet filings, with an annual true-up based on an annual Telecommunications Reporting Worksheet. Federal-State Joint Board on Universal Service; Petition for Reconsideration by AT&T, CC Docket No. 96-45, FCC 01-85 (rel. March 14, 2001) ("Federal-State Joint Board on Universal Service Order" or "Order"). In this Order, the FCC required such quarterly statements be made on FCC Form 499-Q. Moreover, in this Order, the FCC stated that "carriers will be allowed an opportunity to file a revised Form 499-Q prior to the filing date of the next Form 499. On April 6, 2001, the then Common Carrier Bureau announced approval of FCC Form 499-Q by the Office of Management and Budget. The FCC did not give prior notice and request public comment on the issue of a deadline for filing revised FCC Form 499-Qs. On April 8, 2002, the WCB announced the release of revised FCC form 499-Q. The Instructions to Telecommunications Reporting Worksheet, FCC Form 499-Q provide that "[a]

[9] Earlier published versions of the Instructions to Form 499-A contained language identical to the draft February 2004 Instructions. *See* Consolidated Reporting Order Appendix D -- Telecommunications Reporting Worksheet, at II (E) ("Contributors should file revised Form 499-A worksheet by December 31 of the same calendar year. Revisions filed after that must be accompanied by an explanation of the cause for the change along with documentation showing how the revised figures derive from corporate financial records.").

[10] Wireline Competition Bureau Releases Revised Telecommunications Reporting Worksheet (FCC Form 499-A) for 2003, CC Docket No. 96-45, Public Notice (rel. February 26, 2004).

contributor must file a revised 499-Q worksheet if it discovers an error in the data that it reports, such as would arise if the filer discovered that it omitted or misclassified a major category of revenue. However, revised filings must be made by the filing date for the subsequent 499 filing." *Id.* at ¶ II(E). As stated above, the FCC did not subject this instruction to notice and comment.

e. **The FCC's Modification to the Revenue-Based Methodology for Assessing Universal Service Contributions, and its Retention of Forms 499-A and 499-Q**.

In December 2002, the FCC adopted several modifications to the revenue-based system to insure the sufficiency and the predictability of universal service. Among other things, the FCC modified the current revenue-based methodology by basing contributions on a percentage of projected collected, instead of historical gross-billed, interstate and international end-user telecommunications revenues reported by contributors on a quarterly basis. In the Matter of Federal-State Joint Board on Universal Service. 17 FCC Rcd. 24852 (2002).

In adopting this modification, the FCC noted that contributors will continue to file a Form 499-Q on a quarterly basis and the Form 499-A on an annual basis. *Id.* at ¶ 33. The FCC further noted that, "[s]imilar to existing policies, contributors will have an opportunity to correct their projections up to 45 days after the due date of each Form 499-Q filing and through the annual true-up process." *Id.* (emphasis added). The FCC recognized that USAC would refund or collect from contributors any over-payments or under-payments.

f. **The FCC has Acknowledged that its Existing Rules Do Not Contain Deadlines for Filing Revision to FCC Forms 499-A and 499-Q, and has Conceded that Any Such Deadlines are only Set Forth in the Instructions to these Forms**.

Significantly, consistent with its reference to "existing policies" regarding deadlines to file revised Form 499-Qs, as opposed to an existing rule, the FCC has previously acknowledged that its "rules do not specifically address revised Form 499-Q filings..." In the Matter of Request for Review by ABC Cellular Corporation, Federal-State Joint Board on Universal Service, CC Docket

No. 96-25, 17 FCC Rcd. 25192 (2002). Thus, the FCC has recognized that only the FCC Form 499-Q Instructions, as opposed to any rule, states that revised filings must be submitted by the next FCC Form 499 filing deadline. *Id.* at 25196-97.

Moreover, in the December 9 Order, the WCB implicitly acknowledges that there is no FCC rule that states that revised FCC Form 499-As must be filed within a specified time period. Thus, in the December 9 Order, the WCB states

> "Adoption of a firm deadline for filing revisions to the Worksheet will help ensure the stability and sufficiency of the federal Universal Service Fund, as contemplated in Section 254(d) of the Communications Act of 1934, as amended (the "Act"). (Footnote omitted) We also find that a firm deadline for revised Worksheets will improve the integrity of the universal service contribution methodology and promote efficiency in the administration of support mechanisms for universal service, interstate Telecommunications Relay Service, the North American Numbering Plan and Local Number Portability, consistent with the Commission's rules and policies."
>
> December 9 Order at ¶2

Accordingly, it is beyond question that no FCC rule exists that mandates a firm deadline or statute of limitations within which carriers must file revisions to their annual reports of revenues and computation of their contribution to the USF. In the December 9 Order, the WCB states that the USAC itself had previously established a deadline of 12 months to allow contributors to file new or revised FCC Form 499-As after the original due date for a period of up to 12 months. In support of this statement, which the WCB characterizes as a "processing guideline," the WCB cites to the minutes of a USAC Board of Directors meeting of July 27, 1999. In these minutes, USAC's Board directed USAC's staff not to accept carrier-initiated changes in revenues beyond 12 months from the initial report of revenues.

Significantly, BDP can find no evidence that the USAC's Board of Directors' minutes of its July 27, 1999 meeting were ever publicly released in an FCC publication, or indeed ever published

in the Federal Register as apparently required by Section 552 of the APA. Thus, the WCB cannot legitimately rely on these minutes to claim that there is an existing rule or policy establishing a 12-month deadline for filing revisions to FCC Form 499-A.[11]

BDP submits that USAC had no authority to establish such a deadline, and that, in any event, such a deadline constitutes a substantive rule requiring a notice and comment rulemaking before it could be adopted.

2. The WCB Failed to Follow the Notice and Comment Requirements Set Forth in Section 553 of the APA in Adopting the December 9 Order.

In the December 9 Order, the WCB asserts that the 12-month deadline is a procedural, non-substantive change to the administrative aspects of the reporting requirements. See, December 9 Order at n. 31. BDP submits, however, that the changes are not procedural, but substantive. The establishment of a 12-month deadline for filing revisions is equivalent to a statute of limitations that bars carriers from seeking refunds for overpayments after 12 months. As such, this new deadline affects the rights and obligations of contributors to the USF, which, as shown below, makes the deadline "substantive" rather than "procedural."

a. A Notice and Comment Rulemaking Period is Required Before the FCC Can Adopt Substantive Rules.

The APA defines "rule" as:

> "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy...."

5 U.S.C. § 551 (4).

The APA's general rulemaking section, Section 553, 5 U.S.C. § 553, sets out certain procedural requirements with which federal agencies like the FCC must comply in promulgating a

[11] In BDP's pending February 28, 2003 appeal of USAC's December 31, 2002 decisions denying BDP's request for refund, which the WCB has remanded to the USAC for consideration in light of the December 9 Order, BDP has challenged that the USAC's claimed 12-month statute of limitations for filing revised FCC Form 499-As as unlawful because it is a substantive rule and could not be adopted without notice and comment rulemaking to be effective. See BDP's February 28, 2003 Appeal at ¶¶ 21 – 27.

legislative rule: there must be publication of a notice of proposed rulemaking; opportunity for public comment on the proposal; and publication of a final rule accompanied by a statement of the rule's basis and purpose. Utility Solid Waste Activities Group v. Environmental Protection Agency, 236 F. 3d 749, 752 (D. D.C. 2001) *citing* Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519, 523-24 (1978). The APA's notice and comment procedures have two purposes: " 'to reintroduce public participation in fairness to affected parties after governmental authority has been delegated to unrepresentative agencies,'" (citations omitted); and to assure that the agency is presented with all information and suggestions relevant to the problem at issue. White v. Shalala, 7 F. 3d 296, 303 (2d Cir. 1993).

Section 553(b)(A) of the APA, however, carves out an important exception to the notice and comment procedures. Federal agencies need not follow the prescribed rulemaking process to create "interpretive rules, general statement of policy, or rules of agency organization, procedure, or practice." 5 U.S.C. § 553(b)(A).

Thus, federal agencies must follow notice and comment procedure prior to issuing a legislative rule, but producing a non-legislative rule requires no such process. *See* 5 U.S.C. § 553(b). To determine whether a rule is non-legislative or legislative, courts consider whether the rule is "substantive" in nature. Chrysler Corp. v. Brown, 441 U.S. 281, 301-02 (1979). Stated another way, if a rule has substantive effects, it should have been promulgated as a legislative rule, and therefore the agency should have followed the notice and comment procedure prior to adopting it. Chrysler, 441 U.S. at 301-02; Professionals and Patients for Customized Care v. Shalala, 56 F. 3d 592, 595 (5th Cir. 1995) (if a rule is "substantive," the exemption is inapplicable, and the full panoply of notice and comment requirements must be adhered to scrupulously).

A legislative rule is substantive if it has a binding, significant and immediate effect on the rights and obligations of the public. Chrysler, 441 U.S. at 301-02; *see also* Avoyelles Sportsmen's

League, Inc. v. Marsh, 715 F. 2d 897, 908 (5th Cir. 1983) (substantive rules, "grant rights," "impose obligations," "produce other significant effects on private interest," or "have substantial legal effect"); Perales v. Sullivan, M.D., 948 F. 2d 1348, 1354 (2d Cir. 1991) (a "substantive regulation" is one which "grant[s] rights, impose[s] obligations, or produce[s] other significant effects on private interest."). Generally speaking, it seems to be established that "regulations," "substantive rules," or "legislative rules" are those which create law, usually implementary to an existing law. Professionals and Patients for Customized Care, 56 F. 3d at 602.[12]

A substantive rule promulgated without adhering to the requisite notice and comment procedure is unlawful. Id. Community Nutrition Institute, 818 F. 2d at 946-49 (invalidating Food and Drug Administration's "action levels" because these rules were produced without notice-and-comment yet applied as law). See also, Stearn v. Department of the Navy, 280 F. 3d 1376, 1382 (Fed. Cir. 2002) ("The CSRS statute makes no reference to a deadline for requesting a determination as to LEO status. Neither does it provide for a regulatory time limit for requesting a determination on LEO retirement coverage. 5 C.F.R. §§ 831.906(e) and (f), which address these issues and are the focus of this appeal, our products of notice-and-comment rulemaking. (Citations omitted)."); *Federal Election Commission v. NRA Political Victory Fund, et al.*, 778 F. Supp. 62, 64 (D. D.C. 1991) rev'd on other grounds, *Federal Election Commission v NRA Political Victory Fund, et al.*, 6 F. 3d. 821 (D.C. Cir. 1993). ("The FEC has promulgated regulations through the appropriate notice and comment rulemaking procedure which set a 30-day time limit on reimbursements for solicitation expenses. *See* 11 C.F.R. § 114.5(b)(3)).

[12] Although the APA itself does not define "substantive rules," "interpretive rules," or "statement of policy," courts have developed a body of jurisprudence that is helpful in drawing necessary – but often illusory – distinctions among these types of rules. Professionals and Patients for Customized Care, 56 F. 3d at 595 *citing* Community Nutrition Institute v. Young, 818 F. 2d 943, 946 (D.C. Cir. 1987) (recalling that courts and commentators have described the distinction between substantive and interpretive rules or policy statement as, *inter alia*, "tenuous," "fuzzy," "blurred," "baffling," and "and shrouded in considerable smog").

As stated above, federal agencies do not have to follow the nature and comment rulemaking process if they are creating interpretive rules, general statements of policy, or rules of agency organization, procedure or practice. 5 U.S.C. § 553(b)(A). However, the "APA's notice and comment exemptions must be narrowly construed." P*rofessionals and Patients for Customized Care*, 56 F. 3d at 595.

b. **The APA's Exception for Interpretive Rules**.

Unlike legislative rules, non-legislative rules lack the binding effect of law and do not create obligations, convey rights, or cause significant effect. *Chrysler*, 441 U.S. at 301-02. Non-legislative rules include "interpretive" regulation, which is simply an agency's "intended course of action, its tentative view of the meaning of a particular statutory term, or internal house-keeping measures organizing agency activities." *Perales*, 948 F. 2d 1354 (citations omitted). "Interpretive rules are not intended to alter legal rights, but to state the agency's view of what existing law requires." *Sekula v. FDIC*, 39 F. 3d 448, 457 (3d Cir. 1994). *Chrysler*, 441 U.S. at 302 n. 31, 315-16 (noting that interpretive rules inform the public how an agency interprets the statute or how it administers its substantive rules and that interpretive rules do not create binding law); *Alcaraz v. Block*, 746 F. 2d 593, 613 (9th Cir. 1984) (noting that interpretive rules are essentially hortatory and instructional and they are used more for discretionary fine-tuning than for general lawmaking). Therefore, interpretive rules do not require notice and comment prior to their enactment. *Perales*, 948 F. 2d 1354.

c. **The APA's Exception for General Statements of Policy**.

Non-legislative rules also include general statements of policy. A general statement of policy is the outcome of neither a rulemaking nor an adjudication; it is neither a rule nor a precedent but is merely an announcement to the public of the policy which the agency hopes to implement in future

rulemakings or adjudications. *Pacific Gas and Electric Co. v. Federal Power Commission*, 506 F. 2d 33, 38 (D.C. App. 1974).

The critical distinction between a substantive rule and a general statement of policy is the different practical effect that these two types of pronouncements have on subsequent administrative proceedings. *Id.* A properly adopted substantive rule establishes a standard of conduct which has the force of law; the underlying policy embodied in the rule is not generally subject to challenge before the agency. *Id.*

On the other hand, a general statement of policy does not establish a "binding norm." *Id.* It is not finally determinative of the issues or rights to which it is addressed. *Id.* The agency cannot apply or rely upon a general statement of policy as law because a general statement of policy only announces what the agency seeks to establish as policy. *Id.* A policy statement announces the agency's tentative intentions for the future. When the agency applies the policy in a particular situation, it must be prepared to support the policy just as if the policy statement had never been issued. *Id.* An agency cannot escape its responsibility to present evidence and reasoning supporting its substantive rules by announcing binding precedent in the form of a general statement of policy. *Id.* at 38-39.

d. **The APA's Exception for Agency Organization, Procedure, or Practice**.

Finally, non-legislative rules include rules of agency organization, procedure, or practice. Section 553(b)(A) of the APA has been described as essentially a "housekeeping" measure, *Chrysler Corp.*, 441 U.S. at 310, "[t]he distinctive purpose of... [which] is to ensure ' that agencies retain latitude in organizing their *internal* operations.'" *American Hospital Assn. v. Bowen*, 834 F. 2d. 1037, 1047 (D.C. Cir. 1987). Where nominally "procedural" rules "encode[ ] a substantive value judgment" or "substantially alter the rights or interests of regulated" parties, however, the rules must be preceded by notice and comment. *Id.* at 1047, 1041; *Reeder v. FCC*, 865 F. 2d 1298, 1305 (D.C.

App. 1989) (*quoting* American Hospital Assn., 834 F. 2d at 1047) (The procedural exception to notice and comment "does not apply where the agency "encodes a substantive value judgment").

3. **The WCB's 12-month Statute of Limitations for Filing Revised FCC Forms 499-A is a Substantive Rule and can Only be Adopted after Notice and Comment Rulemaking**.

Contrary to the WCB's contention in the December 9 Order that the 12-month statute of limitations for filing revised FCC Forms 499-A "procedural" and "non-substantive," and "a rule of agency organization, procedure, or practice," the 12-month statute of limitations is a substantive rule which can only be adopted after notice and comment proceedings are held pursuant to Section 553 of the APA, 5 U.S.C. § 553.

First, the WCB's 12-month statute of limitations "encodes a substantive value judgment" or "substantially alters the rights or interests of regulated" parties. *See* American Hospital Assn., 834 F. 2d 1041. Consequently, the WCB cannot, without fully complying with notice and comment rulemaking, adopt a nominally "procedural" rule which includes these factors

Second, characterizing the 12-month statute of limitations as "procedural" and, thus, exempt from notice and comment rulemaking, is wholly inconsistent with the federal courts' uniform treatment of statute of limitations as substantive for purposes of conflict of laws analysis. *Bradley v. National Association of Securities Dealers Dispute Resolution, Inc.*, 2003 WL 255966 (D.D.C.) at * 2 citing *Steorts v. Am. Airlines*, 647 F. 2d 194, 1996-97 (D.C. Cir. 1981) ("Erie clearly mandates that in diversity cases the substantive law of the forum controls with respect to those issues which are outcome-determinative, and it is beyond cavil that statute of limitations are that character."); *Cantor Fitzgerald Inc. v. Lutnick*, 313 F. 3d 704, 710 (2d Cir. 2002) ("[a] state's rules providing for the start and length of the statute of limitations is substantive law."). citing *Klehr v. A.O. Smith Corp.*, 87 F. 3d 231, 235 (8th Cir. 1996), aff'd 521 U.S. 179 (1997); *Nevada Power Co. v. Monsanto Co.*, 955 F. 2d 1304, 1306 (9th Cir. 1992).

The WCB's 12-month statute of limitations imposes binding, significant and immediate effects on the rights and obligations of all telecommunications carriers including BDP, which, by law, must contribute to the USF. It, therefore, constitutes a substantive rule. *See* Chrysler, 441 U.S. at 301-02. Indeed, the Supreme Court determined long ago that a "statute of limitations substantially affects the outcome of litigation. For the purposes of rulemaking authority, statutes of limitation must, therefore, be considered substantive in individual cases." *In Re "Agent Orange" Product Liability Litigation*, 597 F. Supp. 740, 808 (E.D. N.Y. 1984) citing *Guarantee Trust Company of New York v. York*, 326 U.S. 99 (1945).

The well-known jurist Judge Richard Posner of the Seventh Circuit has acknowledged that statutes of limitations are substantive and require notice and comment rulemaking: "[t]he reason courts refuse to create statutes of limitations is precisely the difficulty of reasoning to a number by the methods of reasoning used by courts….When agencies base rules on arbitrary choices they are legislating, and so these rules are legislative or substantive and require notice and comment rulemaking, the procedure that is analogous to the procedure employed by legislatures in making statutes." *Hoctor v. United States Department of Agriculture*, 82 F. 3d 165, 170-71 (7th Cir. 1986); *see* also *Shelton v. United States Steel Corporation*, 1987 WL 35499 (S.D. Ohio) ("retroactive application of the statute limitations contained in O.R.C. 4121.80(A) to plaintiff's pending cause of action affects plaintiff's accrued substantive right in his cause of action and does not merely affect a rule of practice or remedy").

Here, the WCB's 12-month deadline directly and adversely affects the ability of contributing telecommunications carriers, and in fact, bars them, from seeking refunds for overpayments to the USF if they determine after this time period that they have made errors in their revenue reporting. This fact is an essential characteristic of a substantive rule. S*ee St. Francois Health Care Center v. Shalala*, 205 F. 3d 937 (6th Cir. 2000) *citing Shalala v. Guernsey Memorial Hospital*, 514 U.S. 87,

99 (1995) (characterizing PRM as an interpretive rule, noting that "[t]he rule does not effect new substantive reimbursement standards inconsistent with prior regulations – the central characteristic of a substantive rule."); *see also* Matthews v. Kidder, Peabody & Company, Inc., 161 F. 3d 156, 166 n. 17 (noting that it would be unlikely to apply a statute of limitations retroactively under the Recruiter Influenced Corrupt Practices Act so as to bar a plaintiff's claim, as it would likely find that such an amendment affects the substantive rights of the parties and thus is presumed to apply only prospectively); *Burns v. Morton*, 134 F. 3d 109, 111 (3d Cir. 1998) (refusing to apply retrospectively a new statute of limitations in 28 U.S.C. § 2244 (d)).

Accordingly, because the WCB's 12-month statute of limitations is a substantive rule, the WCB had to fully comply with APA notice and comment rulemaking procedures under Section 553(b)(A), before the it could adopt this deadline. The WCB's failure to comply with the mandatory rulemaking procedures renders the 12-month statute of limitations in the December 9 Order unlawful, invalid and unenforceable. See *Professionals and Patients for Customized Care*, 56 F. 3d at 595; *Community Nutrition Institute*, 818 F. 2d at 946-49.

The WCB reliance on *JEM Broadcasting Company, Inc.* to support its conclusion that the 12-month deadline for filing revisions to FCC Form 499-A is "procedural" and "non-substantive" and a "rule of agency organization, procedure or practice" is to no avail. In *JEM Broadcasting Company, Inc.*, the U.S. Court of Appeals for the D.C. Circuit held that the FCC's "hard look" rules which established a 30-day period for applicants to file "substantially complete" applications for new FM broadcast service, and a second 30-day period for applicants to file perfecting amendments if their applications were "substantially complete," were procedural, and thus, were not required to be adopted after notice and comment as mandated by Section 553 the APA.

The FCC's "hard look" rules, however, merely required applicants for newly allotted FM broadcast channels to include all information prescribed by the FCC's existing FM application rules

in their applications, in order for their applications to be termed "substantially complete," and before they could avail themselves of the 30-day window to file perfecting amendments. Thus, the FCC's "hard look" rules did not change the objective standards by which the FCC evaluated applications for new FM broadcast service, but only required applicants to strictly observe the existing FCC rules pertaining to information submitted in their application.

Here, in stark contrast to the FCC's application of its "hard look" rules to applicants, the 12-month deadline changes the right of a carrier contributor to USF to seek a refund of an overpayment at any time. It deprives contributing carriers from filing for a refund if they discovery an error in their reports after 12 months. Before the effectiveness of the WCB's December 9 Order, and notwithstanding the WCB's reference to the USAC's apparent 12-month "processing guideline," BDP submits that a contributor could file a revised FCC Form 499-A at any time. Thus, the newly adopted 12-month statute of limitations takes away a telecommunications carrier contributor's right to obtain a refund for an overpayment, unless the carrier requests a refund within 12 months. Therefore, the WCB's change in the deadline alters the rights and interests of contributors to the USF, and is therefore substantive, and not within the exception to the APA that allows rules of agency procedure, organization or practice to be adopted without prior notice and comment.

4. **The WCB's Imposition of a 12-month Statute of Limitations for Filing Revised FCC Forms 499-A Exceeds WCB's Authority, Is Arbitrary and Capricious and an Abuse of Discretion**.

As detailed above, the current instructions to Form 499-A provide that "[t]elecommunications providers should file revised Form 499-A revenue data by December 1 of the same filing year. Revisions filed after that must be accompanied by an explanation of the cause for the change along with complete documentation showing how the revised figures derived from corporate financial records." As also shown above, the FCC delegated authority to make future changes to the Telecommunications Reporting Worksheet to the WCB. In so doing, the FCC

cautioned that "[t]hese delegations extended to administrative aspects of the requirements, *e.g.*, where and when worksheets are filed, incorporating edits to reflect Commission changes to the substance of the mechanisms, and other similar details." Consolidated Reporting Order, at ¶ 39. Indeed, later in its Consolidated Reporting Order, the FCC "reaffirm[ed] that this delegation extends only to making changes to the administrative aspects of the reporting requirements, not to the substance of the underlying programs." *Id.* at ¶ 40 (emphasis added); 47 C.F.R. § 50.17(b); 47 C.F.R. § 54.711(c.).

The WCB's definite statute of limitations is not merely a change to the administrative aspects of the reporting requirements, but instead a change to the substance of the underlying universal service fund program because it eliminates the existing right of a carrier contributor to seek a refund at any time after it has filed its FCC Form 499-A. Under the Consolidated Reporting Order, the WCB has no delegated authority from the FCC to make such a change. Consequently, the WCB grossly exceeded its authority in adopting the 12-month statute of limitations because it failed to adhere to the notice and comment requirements of the APA.

The WCB's actions in the December 9 Order are also arbitrary and capricious and constitute abuse of discretion because the WCB failed to adhere to the notice and comment requirements of the APA and because it provided no real basis for the one-year deadline. Indeed, the fact that the WCB did not apply the one-year deadline when the USAC seeks underpayments from contributory carriers establishes the arbitrary and capricious nature of the deadline.

Moreover, the WCB's imposition of a 12-month statute of limitations is particularly at odds with the statutory requirements for recovering universal service contributions. Under the present statutory regime, the mechanisms for universal service contributions must be specific, predictable and sufficient, and contributions to the universal service fund must be made on an equitable and non-discriminatory basis. See 47 U.S.C. § 254(b)(4) and (5). See also *In the Matter of Request for*

Review by ABC Cellular Corporation, 25 FCC Rcd. at 25192. By subjecting contributing carriers, including BDP, to a 12-month statute of limitations and refusing to allow such carriers to file revised Forms 499-A to correct prior inaccuracies if they are discovered after the 12-month deadline, the WCB is compelling contributing carriers to pay in excess of the amount they lawfully should have contributed to the USF under Section 254 of the Communications Act. As a result, carriers will be compelled to make an erroneous and excessive contribution to support universal service, a result wholly inconsistent with the requirement that universal service fund contributions be made on an equitable and non-discriminatory basis. *ABC Cellular Corporation*, 17 FCC Rcd. at 25196-97. ("Absent a waiver, ABC Cellular would be required to contribute an erroneous amount to support universal service, which we believe would be inconsistent with the requirement that contributions be equitable."). This inconsistency with Section 254 of the Act is another reason why the WCB should have given notice of the proposed rule, and requested public comment before adopting a 12-month statute of limitations for seeking a refund for an overpayment to the USF. Notwithstanding the WCB's attempted justification for the new filing revision deadline, there are plenty of reasons to suggest why the deadline should be longer, if one needs to be established at all. Indeed, BDP notes that even the Internal Revenue Service grants a taxpayer three years from the time he filed his return or two years from the time he paid his taxes, whichever is later, to claim a refund for overpayment of a tax. *See* 26 U.S.C. § 6511. A notice and comment proceeding will give the WCB a complete set of reasons, both pro and con, from which it can decide the proper time period for filing revisions to FCC Form 499-A.

VIII. **CONCLUSION**.

In view of the foregoing, BDP respectfully requests that the FCC review the WCB's December 9 Order, and declare the 12-month deadline for filing revisions to FCC Forms 499-A

invalid and unlawful as exceeding the WCB's delegated authority, and an arbitrary and capricious and an abuse of discretion for failing to hold a notice and comment rulemaking proceeding.

Dated: January 10, 2005.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a courtesy copy of this **APPLICATION FOR REVIEW** was served via U.S. Mail, postage pre-paid, on this the 10th day of January, 2005, to:

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